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ADMINISTRATIVE LAW SECTION of AMERICAN BAR ASSOCIATION

CONTENTS

Federal Legislation 35
Supreme Court 35
Procedure Act Cases 42
Other Federal Cases 44
State Cases and Legislation 62
Section Activities 64

FEDERAL LEGISLATION

Jurisdiction to review orders of the Federal Communications Commission and certain orders of the Secretary of Agriculture and the Maritime Commission has been transferred from a statutory three-judge district court to the circuit court of appeals by the Hobbs Bill, P. L. 901, CH 1189, 81st Congress, Second Session, approved December 29, 1950, and effective January 28, 1951. There is no longer a right of direct appeal to the Supreme Court, the certiorari procedure having been substituted. Pending cases still proceed to final disposition under the old law.

Sections 5, 7 and 8 of the Administrative Procedure Act do not apply to proceedings relating to the exclusion or expulsion of aliens under a clause in the Supplemental Appropriation Act of 1951 signed by the President on September 27, 1950. This may in effect reverse the Supreme Court's decision in *Wong Yang Sung* v. *McGrath*, 339 US 33 (1950). Under this exemption from the requirements of the Procedure Act, the Immigration and Naturalization Service has already amended its hearing procedure, but it does continue to prohibit an officer from hearing a case if he has had investigative or enforcement functions in it. (See 19 Law Week 2152 and 2197).

S. 658, amending the Communications Act, has been favorably reported by the Senate Committee on Interstate and Foreign Commerce. It is designed to clarify the intent of the Act, separate adjudicative and prosecuting functions and make the application of the Administrative Procedure Act clear. (19 Law Week 2347).

SUPREME COURT

The United States Supreme Court's decision in *Universal Camera Corp.* v. *NLRB*, 71 S. Ct. 456 (1951) overrules the Courts of Appeals of six circuits and purports to establish a new rule on the scope of review of not only the National Labor Relations Board but of all agencies subject to the Administrative Procedure Act. The substantial evidence rule has not been discarded but the determination of what that phrase requires in the way of support for an agency's order may have been broadened in a number of circuits. The court finds that this "change" has occurred as a result of the inclusion of the word "substantial" (which was originally supplied by the court itself) and the phrase "on the record considered as a whole" in the Taft-Hartley Act. To Mr. Justice Frankfurter

this language plus the terminology of the Procedure Act indicates a Congressional "mood" of dissatisfaction with the extent of judicial review accorded under the Supreme Court's decisions. The heart of the case is a direction to the Courts of Appeals to determine the presence or absence of substantial evidence to justify an agency's order by an examination of the evidence opposed to such order as well as that tending to support it. Some courts apparently felt that their function had been performed when they had ascertained that the record contained evidence which would, if uncontroverted, be a sufficient basis for the order. Now these courts must take the further step of deciding whether this evidence is still sufficient after the remainder of the record has been scrutinized. Mr. Justice Frankfurter acknowledges that this procedure may well have been observed by perhaps a majority of the lower courts.

Although the opinion contains the detailed review of cases and legislative history that is characteristic of its author, the court is not deluded about the intangible nature of the rule laid down. "Since the precise way in which courts interfere with agency findings cannot be imprisoned within any form of words, new formulas attempting to rephrase the old are not likely to be more helpful than the old. There are no talismanic words that can avoid the process of judgment. The difficulty is that we cannot escape, in relation to this problem, the use of undefined defining terms." (465)

This language and the recognition that no change will be imposed upon some courts, taken with the court's statement that "retention of the familiar 'substantial evidence' terminology indicates that no drastic reversal of attitude was intended" would seem to make this case less than revolutionary. However, the court as well as Congress seems to have a new "mood," and this changed attitude gives the opinion added significance, particularly in view of the court's application of the decision to the Procedure Act. Mr. Justice Frankfurter says that the statutes "direct that courts must now assume more responsibility for the reasonableness and fairness of Labor Board decisions than some courts have shown in the past. Reviewing courts must be influenced by a feeling that they are not to abdicate the conventional judicial function." (466)

Before the court reached this conclusion, it sounded a warning that the statutes do not "negative the function of the Labor Board as one of those agencies presumably equipped or informed by experience to deal with a specialized field of knowledge, whose findings within that field carry the authority of an expertness which courts do not possess and must therefore respect. Nor does it mean that even as to matters not requiring expertise a court may displace the Board's choice between two fairly conflicting views, even though the court would justifiably have made a different choice had the matter been before it *de novo*. Congress has merely made it clear that the reviewing court is not barred from setting aside a Board decision when it cannot conscientiously find that the evidence supporting that decision is substantial, when viewed in the light that the record in its entirety furnishes, including the body of evidence opposed to the Board's view." (465)

The Courts of Appeals in their turn will be reviewed only "when the standard ap-

pears to have been misapprehended or grossly misapplied." (466) It might be said that the same degree of finality accorded to the agency orders by the lower courts will be accorded to such courts' determinations regarding substantial evidence by the Supreme Court. This fact is emphasized in the companion opinion in *NLRB* v. *Pittsburgh Steamship Co.*, 71 S. Ct. 452 (1951), in which the Court said it might well support the Board's conclusion and reject that of the lower Court if it passed upon the case in the first instance or made an independent review of the review of the court below, "but Congress has charged the Courts of Appeal and not this Court with the normal and primary responsibility for granting or denying enforcement of Labor Board orders." The opinions in these two cases make it clear that the Courts of Appeals should sustain an administrative order based upon a record which "fair-minded judges could find . . . tilting either way," but that if the courts failed to do so, it would not justify interference by the Supreme Court. In Justice Frankfurter's words, "the ultimate reliance for the fair operation of any standard is a judiciary of high competence and character and the constant play of an informed professional critique upon its work." (465)

The court specifically holds in the *Universal Camera Corp.* case, Justice Black and Douglas dissenting as to this part of the decision alone, that the trial examiner's report is a part of the record under both the Procedure Act and the Labor Act, and, as such, must be considered by the court in determining the substantiality of the evidence where the Board has rejected the report. The Supreme Court agreed with the lower court that an examiner's findings are more vulnerable than a master's and that the Board has power to reverse them although they are not "clearly erroneous." However, the Supreme Court majority differed from the Court of Appeals on the conclusion to be drawn from this premise. Justice Frankfurter's opinion would not "require that the examiner's findings be given more weight than in reason and in the light of judicial experience they deserve. The 'substantial evidence' standard is not modified in any way when the Board and its examiner disagree." (469) His decision intends "only to recognize that evidence supporting a conclusion may be less substantial when an impartial, experienced examiner who has observed the witnesses and lived with the case has drawn conclusions different from the Board's than when he has reached the same conclusion." (469)

Admitting that "to give the examiner's findings less finality than a master's and yet entitle them to consideration in striking the account, is to introduce another and an unruly factor into the judgmatical process of review," (467) the court nonetheless feels that such a view of the report must be adopted because of the enhanced independence of position given to the examiner by both the Procedure and Labor Acts. The court below had been unable to find a "middle ground" between ignoring the report as a factor in its review and treating the Board's reversal of its examiner as error "whenever it would be such, if done by a judge to a master in equity." For a case correctly applying the Supreme Court's rule see *Joy Silk Mills Inc.* v. *NLRB*, 185 F. 2d 732 (App. D. C. 1950)

The opinion in the *Pittsburgh Steamship Co.* case is confined to the question whether the lower court, having applied the proper standard, had committed error in finding that there was a lack of supporting substantial evidence for the Board's order. Perhaps this case gives a hint regarding the type of situation in which certiorari will be granted, for the Supreme Court here considered the Court of Appeal's opinion "in light of a careful reading of the entire record" to determine whether the "momentum" of the court's earlier decision adverse to the Board on erroneous grounds had influenced the present adverse decision. Presumably this action by the Supreme Court comes within the bounds of the language in the *Universal Camera Corp.* case to the effect that the Supreme Court will intervene to determine whether the standard, although understood by the lower court, has been "grossly misapplied." In the *Pittsburgh Steamship Co.* case the Supreme Court found that the standard of review was both understood and fairly applied.

The same day the unanimous opinion in the *Universal Camera Corp.* case was handed down, the court split on a decision involving the application of the standard thereby set forth, with Mr. Justice Minton writing for the dissenters, "I suppose the way to avoid what we said today in *Universal Camera Corp.* v. *National Labor Relations Board,* supra, is to find facts where there are no facts, on the whole record or any piece of it." *O'Leary* v. *Brown-Pacific-Maxon, Inc.,* 71 S. Ct. 470, 473 (1951). In this case Mr. Justice Frankfurter for the majority found that the District Court recognized and applied the standard in upholding the order of a Deputy Commissioner which awarded a death benefit under the Longshoremen's and Harbor Worker's Act. The Deputy Commissioner had found as a "fact" that the death of an employee occurring in an attempt to rescue unidentified men was covered by the Act. At the time the employee had been at a shore recreation center maintained by the employer, but he drowned while trying to swim across a nearby channel so dangerous that its use for swimming was forbidden. It was conceded that the scope of judicial review of the administrative finding was governed by the Administrative Procedure Act and the substantial evidence rule as it had just been redefined, and on that basis the majority decided that the order was justified because on the record the Deputy Commissioner "could rationally infer" that the death might "fairly be attributable to the risks of the employment." (472)

The court upheld an order of the National Labor Relations Board refusing to deduct state unemplyoment compensation payments from backpay awards to discriminatorily discharged employees in *NLRB* v. *Gullett Gin Co.,* 71 S. Ct. 337 (1951). The Court of Appeals had enforced the order only after requiring such sums to be deducted, but its decision was reversed on the ground that it invaded the sphere of the Board's discretion to determine what remedy in each case best effectuates the Congressional policy established by the Act. (See *Phillips* v. *SEC.,* 185 F. 2d 746 (App. D. C. 1950) for a recent recognition of this principle by a Court of Appeals.) The Supreme Court reasoned that this discretion had not been abused because the present order bore a reasonable relationship to that policy. Again the Court relied upon the legislative history,

pointing out that the Board's practice of disallowing deductions for collateral benefits such as unemployment compensation was well-established when Congress amended the Act in 1947, yet no pertinent modification was made and consequently Congress had accepted the Board's construction.

In *McGrath* v. *Kristensen,* 71 S. Ct. 224 (1950), the court allowed an alien to bring a declaratory judgment action against the Attorney General where the latter had refused to suspend the alien's deportation on the ground that he was ineligible for naturalization. Under the Selective Training and Service Act of 1940 Kristensen would be debarred from becoming a citizen by his application to be relieved from liability under the Act, provided he was a "resident" when he applied for the relief. The issue of his status thus created an actual controversy and he was not required to await arrest and then seek a remedy by way of habeas corpus. The Attorney General argued that §19 (a) of the Immigration Act making his decision on deportation "final" precluded judicial review by any other method, but the Court held that "where an official's authority to act depends upon the status of the person affected, in this case ineligibility for citizenship, the status, when in dispute, may be determined by a declaratory judgment proceeding after the exhaustion of administrative remedies." In reaching this conclusion the Court did not deem it necessary to consider the applicability of §10 of the Administrative Procedure Act.

Mr. Justice Jackson concurred in an amusing opinion in which he pointed out that he had taken a contrary position as Attorney General. Mr. Justice Douglas dissented only as to the holding that Kristensen had been "residing" in the United States.

See also *Prince* v. *Mackey,* 185 F. 2d 578 (6 Cir. 1950), citing the Court of Appeals decision in *McGrath* v. *Kristensen* and holding that the Administrative Procedure Act grants judicial review to one against whom a deportation order has been issued.

The one sentence *per curiam* opinion of the Supreme Court in *Riss and Co. Inc.* v. *United States and Interstate Commerce Commission* may affect hundreds of proceedings involving motor carrier applications. The court had under consideration an unreported judgment of a Special Three-Judge District Court for the Western District of Missouri, Western Division, of November 17, 1950 which had held the Administrative Procedure Act inapplicable to a hearing before the Interstate Commerce Commission on an application for a certificate of public convenience and necessity to extend operation as a common carrier by motor vehicle under §207 (a) of the Interstate Commerce Act. The Supreme Court cited in its order of reversal its earlier decision in *Wong Yang Sung* v. *McGrath,* 339 U. S. 33. The question specifically presented was whether an applicant for a certificate of public convenience and necessity to operate as a common carrier by motor vehicle under §207(a) of the Interstate Commerce Act is entitled to hearing and decision by the Interstate Commerce Commission in accordance with §§5, 7 and 8 of the Administrative Procedure Act and before an examiner appointed and qualified under §11 of that Act. Riss had filed an application for authority to extend its operation. During the course of the proceedings Riss learned that the examiner

presiding was not appointed and qualified under §11 and was not otherwise qualified to preside at hearings under §7 of the Administrative Procedure Act. He was in fact an employee of the Commission's Section of Complaints, Bureau of Motor Carriers, and the Bureau of Motor Carriers appeared as an intervenor in opposition to the application, actively participating in the proceedings both by argument and the introduction of evidence. There are over a hundred employees in the Bureau of Motor Carriers engaged in the determination of Motor Carrier cases as examiners. The Commission has refused to relinquish administrative control of these employees by qualifying them as examiners under the Act. Riss objected to the hearing as in violation of the Administrative Procedure Act and continued its objection throughout the course of the proceeding. The Commission denied its petition for a hearing and decision in accordance with the Act on the ground that the "Proceeding was not required by statute to be determined on the record after opportunity for agency hearing" and therefore that §§5, 7 and 8 of the Administrative Procedure Act were not applicable.

After the examiner recommended and the Commission entered an order denying Riss's application, Riss brought this action in the District Court arguing first, that the Supreme Court and the Commission had consistently held that the adjudication of applications for certificates of public convenience and necessity must be made upon a record after opportunity for hearing; and second, that §5 of the Administrative Procedure Act applies to hearings of the Commission on such applications under *Wong Yang Sung* v. *McGrath* not only where the statute in terms refers to a hearing but also where the hearings are required by necessary construction of the statute. Riss relied upon Supreme Court decisions pointing out that a full and fair hearing is essential to bring into play the Commission's expert judgment, and which emphasize that judicial review is limited to questions of law, constitutional power, and basic requirements of proof in the hearing before the Commission. Turning to the statute Riss contended that the Interstate Commerce Act specifically designated the class of cases in which the Commission might grant operating authority to motor carriers without hearings and formal procedures. This authority, which is limited in time and to emergency needs, was granted because of the requirement for hearings on applications for certificates. From this it was argued that §207(a) of the Interstate Commerce Act, while not including in its terms the word "hearing", requires adjudication by the Commission on the record of a hearing. Thus, §5, of the Administrative Procedure Act is applicable under the interpretation in the *Sung* case. In support of its second point Riss urged that a construction of the Administrative Procedure Act which exempts the Interstate Commerce Commission from the application of §5 would destroy any uniformity in the application of the provisions of the Act as between agencies performing similar functions, and this would defeat one of the primary objectives of the Act. On the basis of Section 10 of the Administrative Procedure Act Riss argued that applicants are entitled to trial *de novo* if the Commission is not required to adjudicate applications on the record of a hearing, although this would apparently be contrary to the intention of Congress and the decisions of the Supreme Court. Finally Riss stressed the

need for an impartial hearing officer where, as in the present case, the Bureau of Motor Carriers actively intervenes in opposition to an applicant because of the possibility of pressure by that Bureau on one of its own employees, designated as hearing officer for a particular case.

The Court below did not deny that a hearing was required by the Interstate Commerce Act in certificate cases but held that "the Commission is not usually required to weigh contested issues of fact such as are inherent in cases of adjudication contemplated by Section 5 of the A. P. A." The court went on to hold that the "discretion" lodged in the Commission and the existence of statutory policy interests results in a determination based only "in part" upon the record of the hearing. The ruling of the court below, in essence, that the determination of the Commission does not rest wholly upon the record of a hearing because the determination involves the exercise of an expert judgment in the intricacies of transportation problems was attacked by Riss on the ground that virtually all administrative determinations are, under such a theory, discretionary and based only in part on the record of the hearing.

The Interstate Commerce Commission argued that the phrase "required by a statute" in §5 of the Administrative Procedure Act limits the application of that section to those instances in which explicit statutory words granting a hearing can be pointed out. This is the construction which was apparently rejected by the Supreme Court in the *Sung* case. Secondly, the Commission urged that prior to 1938 the Interstate Commerce Act required a hearing on applications for certificates of public convenience and necessity, but in that year Congress eliminated the requirements for hearings in such cases. This point, based largely upon a construction of the legislative history, was met by Riss through references to the practice of the Commission in granting hearings in §207(a) cases and by references to Supreme Court cases interpreting the Act as requiring a hearing on applications for certificates of public convenience and necessity. Moreover, it was argued that the exemption from the hearing requirement in cases of emergency enacted in §210(a) of the Interstate Commerce Act would not have been necessary if the hearing requirement were eliminated from Section 207(a). The Commission denied that the effect of §10 of the Administrative Procedure Act would be to permit applicants for certificates to obtain a trial *de novo* in district courts if the applicant were not entitled to a hearing and decision on the record before the Commission. And finally the Commission claimed that outright denial of any hearing upon the application for a certificate would not have been an infringement upon either the statutory or constitutional rights of appellant. This contention was based upon the theory that the certificate is a grant of a privilege conferring no rights but being merely a matter of grace without constitutional safeguard. In reply Riss pointed out that the same situation existed in so far as Congress is concerned in the *Sung* case because Congress possessed the plenary power to bar entry or require deportation of aliens without limitation and consequently, the *Sung* case applied even though it be admitted that Congress could bar all motor vehicles from Interstate Commerce if it saw fit to do so.

The Supreme Court was content to pass upon all of these arguments merely by reversing the judgment and citing the *Sung* case.

ADMINISTRATIVE PROCEDURE ACT

Hearing

The Civil Aeronautics Act, §416 (b) (1), provides that the Board may, "if it finds" certain things, exempt carriers from a variety of requirements. It was contended that this language impliedly required "adjudication . . . to be determined on the record after opportunity for an agency hearing"—that is, that requirements of §§5, 7 and 8 of the Administrative Procedure Act must be observed. Holding otherwise in *Eastern Air Lines, Inc.* v. *CAB,* 185 F. 2d 426 (App. D. C. 1950), the court construed the words in section 416 (b) (1) in their context as meaning little more than "if it believes," although some proceedings might be required, and in this case there were proceedings, including the filing of verified documents. The opinion points out that a different holding would "frustrate the action of Congress in permiting the Board to exempt carriers from nearly all requirements of the Act" including the requirement that certificates be amended only after notice and hearing. To require a full hearing to grant exemption from a full hearing would appear to be absurd. Moreover, the Congress knew how to and did use the words "notice and hearing" in this very Act when it desired to impose that requirement. The court took jurisdiction to decide the issue here although the exemption being litigated had expired, because the question was likely to recur and in addition because judicial determination of important questions "should not be defeated by short-term orders, capable of repetition, yet evading review." (An observation cited from *Southern Pacific Terminal Co.* v. *Interstate Commerce Commission,* 219 U. S. 498, 515, 31 S. Ct. 279, 283, 1911). Finally the court decided that use of the Procedure Act was not required here to protect constitutional rights for the reason that the constitution does not protect against damage suffered from competition made possible by unauthorized administrative action, which was all that petitioner complained of here. Prior to the passage of the statute exempting proceedings involving the exclusion or expulsion of aliens from certain provisions of the Procedure Act, it was argued in *Papagianakis et al.* v. *The S. S. Samos,* 186 F. 2d 257 (4 Cir. 1950) that § 5 of the Act invalidated a detention order under which certain seamen were held aboard ship. However, the court found it necessary to decide only that the ship's officers were not justified by the section in ignoring the order of the immigration inspector requiring that the seamen be kept aboard. This was a suit for false imprisonment and the action had already been dismissed as to the inspector on the ground that he performed a quasijudicial function and was not liable in tort.

Evidence

The opinion testimony of four expert dentists who based their views on clinical experience but who had had no personal experience with the product with which the case was concerned constitutes substantial evidence which will support a finding of the Federal Trade Commission that a tooth paste ad was deceptive. The experts had

not conducted any experiments with the tooth paste itself, but they did know its formula and were familiar with all of the ingredients. Consequently, they were competent to testify with regard to the characteristics of the product. In this case the testimony was contradicted by that of a witness who had actually observed the effects of the tooth paste. In attacking the Federal Trade Commission's cease and desist order, the manufacturers of Ipana contended that this opinion evidence did not constitute substantial evidence within the meaning of the Federal Trade Commission Act and Section 10 (e) of the Administrative Procedure Act. It was acknowledged by the expert witnesses that their testimony went only to their opinion and that without conducting scientifically controlled experiments they could not have positive knowledge. The court said that "opinion evidence based on the general medical and pharmacological knowledge of qualified experts has often been held to constitute substantial evidence, even if the experts have had no personal experience with the product . . . and this has been done even where witnesses who had personally observed the effects of the product testified to the contrary." *Bristol-Meyers Co.* v. *Federal Trade Commission,* 185 F. 2d 58, (4 Cir. 1950).

Decision Process

The testimony in *NLRB* v. *Stocker Mfg. Co.,* 185 F. 2d 451 (3 Cir. 1950) had been received by a trial examiner who died before he could prepare his report. The National Labor Relations Board then designated another examiner who submitted an intermediate report based upon the transcript, but before it made its own findings the Board examined the record and the report with the exceptions taken by the parties. On petition for enforcement the court held that the action was constitutional, citing *N. L. R. B.* v. *Mackay Radio & Telegraph Co.,* 304 US 333 (1938), and that it violated neither the Labor-Management Relations Act of 1947 nor the Procedure Act. Section 5(c) of the latter act was construed, in fact, "as plain authority for the submission of recommendations by a person other than the examiner who presides at the hearing and has subsequently become unavailable because of death." (454) The court thought that the Labor Act provided for an intermediate report in order to save the Board from having to examine every record, and that, if objections are made to the report, "the Board retains its normal obligation to examine the record and reach its own independent conclusions." Although this statute was enacted later than the Procedure Act the court thought that the "apparent purpose of the intermediate report requirement" in the Labor Act "enables the relevant provisions of the two statutes to stand together." In addition the Labor Act does not expressly supersede or modify the Procedure Act as required by § 12 of the latter. The court's reference to § 12 has been hailed as a hint that the Procedure Act takes precedence over other legislation. In this connection the following language from the Attorney General's interpretation of the section is of interest. "It is recognized that no congressional legislation can bind subsequent sessions of the Congress. The present Act can be replaced in whole or in part at any time after its passage. However, the Act is intended to express general standards of wide applicability. It is believed that the courts should as a rule of construction interpret the Act as appli-

cable on the broad basis, unless some subsequent act clearly provides to the contrary." (Page 231, Administrative Procedure Act, Legislative History, Sen. Doc. No. 248, 79th Cong. Second Session.)

Initial Decision

In a Civil Aeronautics Board proceeding concerning the suspension of a pilot's license the transcript of evidence introduced in an accident investigation hearing was made the record by stipulation of the parties. Later on appeal the pilot contended that the Board violated §§ 5 (c) and 8 (a) of the Administrative Procedure Act, because the Initial Decision was not made by the person who presided at the taking of evidence, but the court disagreed, saying that the "transcript comprised the evidence received at the suspension proceeding. It was the presiding officer at the latter proceeding who received the evidence and it was he who handed down the Initial Decision." *Kuhn* v. *CAB,* 183 F. 2d 839, 843 (App. D. C. 1950.)

Official Notice

An essential part of a National Labor Relations Board decision was based upon official notice taken of a decision in an earlier case in which respondent had not been a party. However, the Board had twice given respondent an opportunity to object to the receipt in evidence of the decision by this method but he had failed to do so. Consequently the court held in *NLRB* v. *Townsend,* 185 F. 2d 378 (9 Cir. 1950) that he was precluded from claiming the action as error in the court proceeding. Judge Denman relied upon § 7 (d) of the Procedure Act dealing with official notice and also upon the practice of the district courts, by which the Board is bound, for the proposition that the agency may take judicial notice in a proper case. This seemed to the court to be such a case despite Judge Denman's reference to the procedure as "dubious."

Judicial Review

The Housing Expediter's order is not subject to judicial review under the Administrative Procedure Act according to *A. & M. Brand Realty Corp.* v. *Woods,* 93 F. Supp. 715 (D. C. 1950), although the reason is not entirely clear. Apparently it is because the court felt that the Expediter was not intended to be subject to the Act's requirements in other respects. However, the order was found to be reviewable under the terms of the Housing and Rent Act of 1947 itself, on the ground that any other holding would raise a question of the Act's constitutionality, inasmuch as in the opinion of the court administrative rate-fixing may not be made final. The fixing of rents was likened to the fixing of public utility rates. Then the court determined that the scope of review is narrower than that provided by the Procedure Act, probably being limited to the question of confiscation, which the court says it may examine even in the absence of a statutory provision.

OTHER FEDERAL CASES

Notice and Hearing

There have been no cases of major significance on the subjects of notice and hearing in the lower federal courts during the period covered by this issue of the Bulletin. In *Montana Power Co.* v. *FPC,* 185 F. 2d 491 (App. D. C. 1950) the company complained that it did not receive notice that

certain issues were in the case until the day evidence on the issue was offered. However, the court found no merit in the contention because the company had presented evidence on the issue, had had an opportunity for a continuance and showed no prejudice to itself resulting from the procedure. An attempt to impound Seamen's Certificates of Service pending determination of charges against them was construed by the court in *In re Merchant Mariners Documents,* 91 F. Supp. 426 (N. D. Calif. 1949), to be the equivalent of a cancellation or suspension of a license without a hearing. This could only be justified under the police power and if summary procedure were authorized at all, it had to be by the legislative power and not by administrative rules; here the statute itself was silent on the subject. Both of these cases are discussed more fully elsewhere in the Bulletin. In the same connection *United States ex rel Adel* v. *Shaughnessy,* 183 F. 2d 371 (2 Cir. 1950) in the section on Scope of Review should be noted.

Evidence

Cases on the hearsay rule continue to arise. The Federal Power Commission admitted newspaper accounts and histories to show that a river had been navigable and the court held that such hearsay evidence might be relevant and have probative value. Indeed, it might be admissible in court proceedings when it is the best available evidence, but in any event it is clearly admissible under the Federal Power Act. *Montana Power Co.* v. *Federal Power Commission,* 185 F. 2d 491 (App. D. C. 1950). Moreover, it may be used. The court quoted as follows from *Willapoint Oysters, Inc.* v. *Ewing,* 174 F. 2d 676, 690 (9 Cir. 1949): "The requirement that the administrative findings accord with the substantial evidence does not forbid administrative utilization of probative hearsay in making such findings." In seeking certiorari (which was denied) the company argued that this case constituted a "tremendous expansion" of the concept of navigable waters.

On the other hand, the National Labor Relations Board was sustained in *Superior Engraving Co.* v. *NLRB,* 183 F. 2d 783 (7 Cir. 1950) in excluding, as hearsay, the testimony of employer's president that certain employees informed him they were leaving the company's service at the direction of the Union. The court thought that the testimony was offered to show, not that the statements were in fact made, but the complicity of the Union. Judge Lindley also rejected the suggestion that the testimony was admissible on the theory that these statements of its members were binding on the Union. It must be remembered that the Taft-Hartley Act requires the Board to conduct its proceedings in accordance with the rules of evidence applicable in the district courts, and to base its findings on the preponderance of the evidence received in the course of such proceedings. In Ohio Associated Telephone Co., 91 N. L. R. B., No. 162, 1950, the Board refused to base findings on uncorroborated hearsay in the record although the testimony was not denied. The order quotes from the *Superior Engraving Co.* case, *supra* (Page 794): "The rule excluding hearsay is a basic rather than a technical rule. The reason for the rule is that the unsworn statement of a person not called as a witness or subjected to the test of cross-examination is not recognized as having sufficient probative effect to raise an inference that the fact is as stated."

An interesting note in the University of Illinois 1950 Law Forum at page 486 criticizes the ruling of Judge Wyzanski in *United States* v. *United Shoe Machinery Corp.*, 89 F. Supp. 357 (D. Mass. 1950) that the attorney-client privilege does not extend to persons in a corporation's patent department. In the department there were members of the bar, though not of the bar of Massachusetts, where it operated; "mere" patent solicitors not members of a bar; and apparently, some Massachusetts attorneys, but the court thought that they all performed more business than legal tasks. The note writer suggests that the same policy considerations that support the privilege for house counsel apply to the patent department; that is, that it is in the public interest to induce the client to disclose to his attorney all of the information necessary to the giving of the best advice. Judge Wyzanski's ruling apparently would apply to all practitioners before administrative agencies and the writer urges that the policy argument should place an expert administrative practitioner within the privilege.

The Taft-Hartley Act introduced the National Labor Relations Board to some of the problems of the district courts as well as to their rules of evidence. In *NLRB* v. *Quest-Shon Mark Brassiere Company,* 185 F. 2d 285 (2 Cir. 1950) respondent secured a subpoena, later quashed, from the Board's examiner for written statements secured by the Board's investigators in preparation for trial. The availability of such papers under the Federal Rules of Civil Procedure had occasioned much litigation, culminating in the cases of *Hickman* v. *Taylor,* 329 US 495 (1947) and *Cleary Brothers* v. *Christie Scow Corp.,* 176 F. 2d 370 (2 Cir. 1949). The court stated that it is now settled that the statements of witnesses to counsel in preparation for trial are not absolutely privileged, but that they cannot be obtained as of course. Some necessity, such as death or unavailability of the witness must be shown, and in the instant case, the court saw no justification for requiring them to be delivered to respondent.

Subpoenas

The subpoena power of the courts is the basis for preliminary investigations to determine coverage and not the jurisdiction of the agency itself, according to the Fifth Circuit Court of Appeals in *United States* v. *Moore,* 185 F. 2d 92 (Cir. 5, 1950). Consequently the government must allege that the defendant was subject to the Fair Labor Standards Act in an indictment for the violation of 18 U. S. C. § 80 by falsifying and concealing facts while under investigation by the Wage and Hour Division, although the investigation was designed to determine coverage among other things. The court's decision rests upon an interpretation of § 80 that makes the statute apply to those actually covered, which may be an unobjectionable ground, but the court's idea of the source of an agency's authority to investigate coverage (and this is the basis used by the court to reject precedents dealing with the enforcement of administrative subpoenas) may be questioned. This is particularly true in those instances in which the statute specifically empowers the agency to conduct investigations. The statute in *Endicott Johnson Corp.* v. *Perkins,* 317 U. S. 501 (1943) empowered the Secretary "to make investigations and findings . . . and prosecute any inquiry necessary to his functions." In *Oklahoma Press Publishing Co.*

v. *Walling,* 327 U. S. 186 (1946) the statute authorized the administrator to "investigate such . . . matters as he may deem necessary or appropriate to determine whether any person has violated" the act. It might be argued that language such as this and not the subpoena power of the courts justifies preliminary investigations and further that the latter is primarily an aid to jurisdiction under the former.

It should be added that in the *Moore Case* the court held that a general allegation of coverage was sufficient as against a motion to dismiss.

An examiner for the Coast Guard sought a court order requiring certain seamen to produce their certificates of service pending the determination of charges against them. The court said that if they were needed for evidence the examiner could decide that fact for himself, issue a subpoena, and secure court enforcement of the subpoena. However when, as here, the certificates were admittedly in the possession of the seamen, their physical presence before the examiner would merely prove what had been conceded and the court would not lend its aid to impound them, especially as they must be produced when the seamen seek employment. *In re Merchant Mariners Documents Issued to Dimitratos et al,* 91 F. Supp. 426 (N. D. Calif. 1949).

Primary Jurisdiction

A suit for damages and for an injunction under the Sherman and Clayton Act was successfully met by the defense of primary jurisdiction under the rule of *United States Navigation Co. Inc.* v. *Cunard Steamship Co.,* 284 US 474 (1932). Plaintiff, a non-scheduled air carrier, alleged the existence of a conspiracy by defendants to suppress competition from plaintiff by such acts as cutting prices and preventing plaintiff's use of ticket and travel agencies. The court found that the evils charged were the very ones that the Civil Aeronautics Act was intended to cure and that the Board had been given wide powers and was equipped both by experience and through its expert personnel to handle just such problems. The controversy involved issues essentially of fact and the exercise of administrative discretion. As a result the Board had primary jurisdiction. *S. S. W. Inc.* v. *Air Transport Ass'n. of America et al.,* 91 F. Supp. 269 (D. D. C. 1950). This defense failed as against the United States in *U. S.* v. *Far Eastern Conference,* 94 F. Supp. 900 (1951) when the primary jurisdiction of the Maritime Commission was urged.

Nor is the jurisdiction of the district court in anti-trust cases contingent upon prior administrative action of the Federal Power Commission. The argument that primary jurisdiction was granted to the Commission by the Federal Power Act is discussed at length but rejected in *Pennsylvania W. & P. Co.* v. *Consolidated G., E., L. & P. Co.,* 184 F. 2d 552 (4 Cir. 1950). The court felt that the terms of the Sherman Act were inserted in the Power Act not to shift the forum but to restrict the licensing power of the Commission with regard to monopolistic combinations. The procedures and powers of the Commission in dealing with such combinations are not sufficiently effective, in the view of the court, to justify a belief that the court's primary jurisdiction has been ousted. Judge Soper's opinion also relies upon such cases as *U. S. Alkali Export Association* v. *United States,* 325 US 196 (1945) for support.

In *American Airlines Inc.* v. *Air Line Pilots Ass'n International,* 91 F. Supp. 629 (E. D. N. Y. 1950) the court, in effect, pointed out that the doctrine applies as between administrative bodies. A System Board of Adjustment set up under a labor-management agreement to deal with grievances ruled that the employer's "failure to comply fully with the intent of" a Civil Air Regulation constituted negligence and contributed to a pilot's failure to remain eligible for flight pay. The Court held that if this was a finding of a violation of the regulation it invaded the primary jurisdiction of the Civil Aeronautics Board. More important is the court's reminder that the powers of administrative agencies are always statutory and cannot be enlarged by agreement of the parties. The Union, to overcome the defense of primary jurisdiction, had argued that the System Board of Adjustment could pass on violations of the regulations because the agreement under which it was set up contemplated the exercise of such authority.

The Interstate Commerce Commission has primary jurisdiction to pass upon the "factual reasonableness" of a railroad's requirement that a negro passenger sit in space reserved for colored passengers despite the fact he had reserved other space. *Greene* v. *Atlantic Coast Line Railroad* (E. D. N. Y. 1951 19 Law Week 2344). Seemingly the suit had been brought with the idea of having the District Court find that the interstate railroad's regulation was unreasonable and to have the court award damages on that basis, but the court said the issue of equality of accommodations is for the Commission to determine in the first instance. In a similar case no mention of the primary jurisdiction of the ICC was made, the court finding by its own examination of the facts that the railroad's segregation rule was invalid because it burdened interstate commerce unduly in that it required passengers on through trains to change seats, was applied only at the railroad's convenience and was not enforced in Pullman or dining cars. *Chance* v. *Lambeth* (4 Cir. 1951 - 19 Law Week 2360).

Judicial Review-General

Failure of the agency to make adequate findings may not be used as a ground on which to attack its order on review by the court if the objection has not been raised before the agency. *Seaboard and Western Airlines, Inc.* v. *Civil Aeronautics Board,* 183 F. 2d 975 (App. D. C. 1950). In this case the statute itself provided that unless an objection had been raised before the Board, it should not be considered by the court except where there were reasonable grounds to explain why the objection had not been made. Moreover, petitioner had asked the Board for a rehearing on other grounds and thus obviously could have pointed out the ground now urged before the court.

An attempt to secure a stay of a Maritime Commission order pending judicial review was unsuccessful, for different reasons, in two proceedings. In *Atlantic and Gulf Conference* v. *United States,* 90 F. Supp. 554 (S. D. N. Y. 1950) the interlocutory injunction was denied apparently on the ground that petitioner's appeal was not sufficiently likely to succeed and petitioners' right to relief appeared to be too much in doubt. Rejecting this theory, the court in *Pacific Westbound Conference* v. *United States,* 92 F. Supp. 936 (N. D. Calif. 1950) denied the application because enforcement

of the order (requiring petitioners to eliminate from their conference agreements prohibitions against the payment of brokerage fees to freight forwarders) pending review did not appear to entail irreparable harm to petitioners.

A privately established arbitration board awarded positions formerly held by waiters-in-charge to dining car stewards without any notice of the proceedings having been served on the former. Upon their seeking to enjoin action under the award, the waiters-in-charge secured a restraining order to give them time to appeal to the National Railroad Adjustment Board to settle the jurisdictional question between the unions involved. The court based the order on an interpretation of the Railway Labor Act, finding that the award constituted a change in working conditions, which called for 30 days notice of intent in order to afford the parties an opportunity to use the administrative remedies provided by the Act. The restraining order was designed to remedy the effect of the failure to give this notice. *Dwellingham* v. *Thompson,* 91 F. Supp. 787 (E. D. Mo. 1950).

Findings of fact made by the Secretary of Labor as a result of administrative hearings under the Walsh-Healey Public Contracts Act are presumptively correct and the burden is upon the defendant to show that they are not supported by the evidence. *United States* v. *Sweet Briar,* 92 F. Supp. 777 (W. D. S. C. 1950). The government was suing to recover liquidated damages for the illegal employment of under-age girls, the Secretary having found that defendant knowingly employed them. Under the act this finding was conclusive upon the court if supported by the preponderance of the evidence.

The issue of the jurisdiction of a Deputy Commissioner to award further workmen's compensation five years after the last payment of compensation may be raised for the first time on appeal to the court according to *Candado Stevedoring Corp.* v. *Willard,* 91 F. Supp. 77 (E. D. N. Y. 1950).

Availability of Review

The doctrine of *Chicago and Southern Air Lines* v. *Waterman S. S. Corp.,* 333 US 103 (1948) has been applied by the Second Circuit Court of Appeals to an order of CAB which dealt not only with the transfer of a temporary certificate of convenience and necessity but also with the acquisition of physical assets. Board action with regard to approval of the latter under § 408 Civil Aeronautics Act, not involving the transfer of the certificate, might be judicially reviewable, but the court held that where the transfer and the acquisition were inextricably mingled as in the case under decision, *Trans World Airlines* v. *CAB,* 184 F. 2d 66 (2 Cir. 1950), it would thwart the Congressional intent to grant the President discretion as to the overseas transportation if judicial review of the portion of the order dealing with the acquisition of assets were allowed. The first order drafted by CAB denied permission for Pan American World Airways, Inc. to acquire the assets, including the certificate, of American Overseas Airlines, Inc. and this order was actually approved by the President. However, the next day, and before it was published or served on the parties, the President withdrew his approval of the order, and later he directed that an order be issued approving the entire transaction. This was done and the present case arose on petition for review of the second order and

for a stay pending review on the merits. Petitioners position was that the first order did not require Presidential approval because § 801 of the Civil Aeronautics Act does not list denial of the transfer of a certificate among actions which are subject to his approval. However, the court felt that such a restricted view of the legislative intent was negated by the "broad sweep" of the doctrine of the *Waterman* case, and that the same policy arguments applied. In any event, the present case involved more than the mere transfer, having been broadened on petitioner's motion to include the amendment of all of the carriers' certificates. The petitioners argued next that if the order required approval, it had received it, and such approval could not be retracted. The court answered this point by interpreting the statute as making the Board merely the President's adviser as to those orders requiring his approval, and pointing out that delivery to an adviser should not put prompt reconsideration beyond his control. An analogy was drawn to a judicial decision recalled from the hands of the clerk of court before he has entered the judgment or notified the parties. The order was unpublished and the parties could not have acted in reliance upon it when it was recalled. Since the second order was legally made, the court was without jurisdiction to review it.

By permitting a default order to be issued against itself by the Secretary of Agriculture awarding damages under the Perishable Agricultural Commodities Act, defendant succeeded in transferring the actual determination of the case to the District Court. In *American Fruit Growers, Inc.* v. *S. T. Runzo & Co.* (W. Pa. 1951-19 Law Week 2405) it was held that defendant's failure to answer the complaint before the Secretary did not bar its appeal to the Court because there was no such restriction specifically set forth in the statute.

The court cannot prevent an agency from reopening a proceeding for the purpose of taking additional evidence after remand because the agency must apply the test of the best interest of the public at all times. And, it might be added, because of *F. C. C.* v. *Pottsville Broadcasting Co.*, 309 US 134 (1940). Consequently writs of mandamus and prohibition were not forthcoming in *Easton Publishing Co.* v. *F. C. C.*, (App. D. C. Oct. 23, 1950—Pike and Fischer, *Administrative Law*, 64 g. 11-1). The Commission had granted a construction permit to Allentown, Pennsylvania, and denied one to Easton, Pennsylvania, whereupon the latter succeeded, upon appeal, in having the case remanded to the Commission for findings as to the comparative needs of the two communities and the relative ability of the applicants to meet the needs. The Commission then decided there were indications of changed conditions and reopened the case to secure additional evidence needed for a proper determination of the issues. On the authority of the *Pottsville* case the court refused to interfere; if the Commission lacked evidence upon which to determine the issue of public convenience and necessity it was warranted in reopening, if not required to do so.

For the purpose and effect of a remand to the National Labor Relations Board see the per curiam opinion in *NLRB* v. *Don Juan Co.*, 185 F. 2d 393 (2 Cir. 1950). The N. L. R. B. ordered a company to bargain with a union although over five years had elapsed since its certification and the last efforts to agree upon a contract. Moreover,

only 10 of the 77 persons employed at the date of the order had been with the company at the time of the election. In enforcing the order the court held in *Superior Engraving Co.* v. *N. L. R. B.,* 183 F. 2d 783 (7 Cir. 1950) that it was for the Board and not the court to determine how the effect of prior unfair labor practices should be expunged, and whether or not lapse of time and changed conditions required that a new election be held. (For more on this case, see the section on Evidence.)

The Civil Aeronautics Board's refusal to consolidate proceedings involves "the manner in which the Board calls its business" and the court will not "oversee the administrative docket." *Western Air Lines* v. *CAB,* 184 F. 2d 545 (9 Cir. 1950). In conflict before the Board were long-haul and short-haul or feeder lines competing for route authorizations, et cetera, and Western, one of the former, was seeking consolidation of the cases in each of which it was a party or intervenor. The proceedings were at varying stages, and were interrelated but none had yet been decided. In denying the motion for consolidation the Board stated that it would unduly expand the issues, unduly delay disposition, or for some other reason was not conducive to proper dispatch of the Board's business to consolidate. Western argued that mutually exclusive issues were involved and therefore *Ashbacker Radio Corp.* v. *F. C. C.,* 326 US 327 (1945) applied, but Judge Stephens ruled that the precedent was "not presently applicable . . . because it does not appear that the Board has made any order which finally deprives petitioner of a right." (551) The important point is that an effective hearing be available and there was no showing that this required consolidation. The opinion contains a valuable discussion of the relationship between the right of an agency to regulate the business before it and the duty of both agency and court to insure the availability of an opportunity for substantially interested persons to present their cases. The argument that the Board's ruling is a non-reviewable interlocutory order is barely touched upon, apparently not having been urged very forcefully by the parties.

Exhaustion of Administrative Remedies

The Communist Party encountered the doctrine requiring the exhaustion of Administrative remedies before judicial review or other judicial action is sought when they applied for a preliminary injunction against the entry of an order by the Subversive Activities Control Board requiring the Party to register under the Internal Security Act. The Court held in *Communist Party* v. *McGrath* (D. C. 1951-19 Law Week 2408) that the Board must be permitted to act first, although Judge Bazelon dissented on the ground that the doctrine does not apply when following the administrative remedy would probably result in the loss of substantial rights. However, he goes along with the holding of the majority that the public interest here outweighs any probability of the deprivation or destruction of such rights.

The doctrine was applied to a party attacking the constitutionality of a licensing ordinance in *Acuff* v. *Mueller et al,* 93 F. Supp. 146 (W. D. Mo. 1950). Plaintiff charged that the license fees were exorbitant and constituted an undue burden on interstate commerce. In the event a license were denied, the ordinance permitted an appeal to the Mayor and City Council, and

provided further that the fees should not be so applied as to unduly burden interstate commerce. When an applicant felt that they had such an effect, he might apply to the Mayor for an adjustment. The Court regarded the employment of these administrative procedures as a condition precedent to the institution of complainant's action unless an excuse for non-performance were shown and consequently denied his application for an injunction.

Whether or not a hospital or sanitarium constituted a housing accommodation under the Housing and Rent Act of 1947 and was therefore subject to rent control presented a substantial question. As a result, the action of the Rent Director in attempting to prescribe the rent was not a clear and unlawful invasion of a private right which would justify the landlord in seeking judicial relief before exhausting the prescribed administrative remedies in the view of the court in *May* v. *Maurer,* 185 F. 2d 475 (10 Cir. 1950). However, in three recent cases Federal Courts have refused to require that administrative procedures be followed to the last possibility of appeal before the court would accept the case. Perhaps *Chambers* v. *Robertson,* 183 F. 2d 144 (App. D. C. 1950) is more properly described as involving the question whether the administrative action was sufficiently final to permit judicial intervention. There a former Army officer, honorably discharged without pay for physical disability, had applied for reconsideration of his case by an Army Review Board in an attempt to have himself put on a pay basis. Veterans' Administration records dated after his discharge had been made part of the record before the Board, which refused to withdraw them. Thereupon the applicant sought mandamus to compel their withdrawal for the reason that the statute required the Board's review to be "based upon" service records. For the Board it was argued that court action would be premature, but the court concluded that the case fell within an exception to the usual rule. Only at this stage and only by judicial remedy could the Board be confined to the statutory procedure. In issuing the writ Judge Stone observed that this is about the only "right" that a litigant has when his claim is entirely created by and dependent upon a statute and involves possible liability of the sovereign. This case was reversed on the construction of "service record." 71 S. Ct. 547 (1951).

In *Reeber* v *Rossell,* 91 F. Supp. 108 (S. D. N. Y. 1950) the court enjoined a reduction of force discharge of a veteran pending the outcome of administrative appeals. The basis of the decision was threefold: that the discharge violated the clear terms of the statute; that no question peculiar to the administrative field need be determined; and that irreparable injury would otherwise occur. The veteran's action for a declaratory judgment was held in abeyance, to become moot if he were successful before the Civil Service Commission's Board, and otherwise to be pressed. Apparently the court felt that the declaratory judgment suit was not prematurely brought because the question involved was essentially one of law as to whether the regulations or actions under them violated the statutes.

Another exception to the doctrine is exhibited in *James Graham Mfg. Co.* v. *United States,* 91 F. Supp. 715 (N. D. Calif. 1950) where the Navy Department agreed that a contractor was entitled to certain monies under his contract with the Department but

the Comptroller General disagreed. Inasmuch as the Navy and the contractor were in agreement, the court did not require the latter to perform the useless act of exhausting the administrative settlement procedure within the department. The Navy's determination of the reimbursable costs, it should be noted, was conclusive in the absence of fraud or overreaching according to the construction placed on the contract by the court. See also *Woods* v. *Laabs,* 92 F. Supp. 220 (W. D. Mich. 1950) allowing defendant in a suit for the violation of rent control laws to raise in court the defense that the order revoking an earlier order permitting an increase was invalid for want of notice even though available administrative appellate procedure had not been followed.

The rather odd question as to who has the burden of proof regarding the exhaustion of remedies arose in *Reconstruction Finance Corporation* v. *Lightsey,* 185 F. 2d 167 (4 Cir. 1950). The question was especially peculiar because it involved the application of the doctrine to the defendant. The Office of the Housing Expediter had ruled that defendant was not entitled to a subsidy or premium payment it had received and RFC consequently sued to recover the money, arguing that the Expediter's holding was conclusive because defendant had not followed administrative appellate procedures which were available. In answer defendant asserted that the record contained not one iota of proof that it had not taken an administrative appeal. The court found that there was such proof in the record, but also said that since it would be extremely difficult if not impossible for RFC to prove the point and manifestly simple for defendant to do so, it was up to the latter to dispel the inferences arising from RFC's allegation that no appeal had been taken. Under the circumstances the court agreed that the Expediter's ruling was conclusive.

Application to a state commission for rehearing is not a prerequisite to an appeal to a three-judge federal court when the commission has a broad discretion to refuse or grant the petition and there is no statutory requirement of such an application before resorting to state judicial remedies. The court in *Ann Arbor R. Co.* v. *Michigan Public Service Commission,* 91 F. Supp. 668 (E. D. Mich., 1950) also held that, the controversy having reached the judicial stage, plaintiff need not pursue available state court remedies before seeking relief in the federal courts where it alleges that the administrative order violates the United States Constitution. The dissent of Judge Thornton is noteworthy. While conceding the jurisdiction of the federal court, he urges a policy of abstention and finds a modern tendency to efface the distinction betweeen administrative and judicial remedies and to compel a party appealing from a state administrative ruling to exhaust all state remedies before resorting to federal courts. Examining the Michigan statutes he finds that the state had provided a choice of at least three avenues to a review of the Commission's ruling and reasons that to allow a party to ignore them is to depart from a tradition of "scrupulous regard for the independence of the state governments."

Although it agreed that the Emergency Court of Appeals has jurisdiction to review administrative decisions under the Emergency Price Control Act of 1942 only after the administrative remedies have been exhausted, a district court assumed jurisdic-

tion in a case in which the protest procedure had not been followed. In *Riverview Packing Co.* v. *Reconstruction Finance Corp.*, 92 F. Supp. 376 (D. N. J. 1950) the RFC argued that the use of the protest procedure was a prerequisite to the jurisdiction of the Emergency Court of Appeals, citing *Illinois Packing Co.* v. *Bowles,* 147 F. 2d 554 (Em. Ct. App. 1945), and consequently was equally a condition precedent to the District Court's concurrent jurisdiction. The court rejected this argument on the ground that 50 U. S. C. A. Appendix, § 924 (a) limited the former's jurisdiction as the RFC stated, but that § 2 (m) imposed no such restriction on the jurisdiction of the district courts. The court did not consider the existence of a rule, apart from statutory requirements, that was expressed as follows by Associate Justice Miller in *Utah Fuel Co.* v. *National Bituminous Coal Commission,* 101 F. 2d 426, 428 (App. D. C. 1938, affirmed 306 US 56, 1939) and quoted by Judge Dobie in *RFC* v. *Lightsey, supra*:

> "It is a well established rule that available administrative remedies must be exhausted before judicial review can properly be given, and that, except as hereinafter noted, preliminary procedural orders of administrative agencies are not subject to judicial review.
>
> "The jurisdictional question whether the order complained of is reviewable is basic and cannot be waived by the parties. One of the important reasons for requiring exhaustion of administrative remedies is to prevent the transfer to courts of duties imposed by law upon administrative agencies. Waivers of such questions in order to secure judicial review cannot give jurisdiction on appeal. 'Primary singleness of action and unity' are imperative, and this would be destroyed by substituting the court for the Commission or by creating a divided authority in the determination of such questions."

Finality

An officer of the Philippine Scouts was denied back pay by the Commanding General of the Philippine Ryukyus Command for the period measured roughly by his recovery from prisoner of war illnesses after his release by the Japanese to his return to U. S. Army control. The officer's claim arose under the Missing Persons Act of March 7, 1942, which authorizes the head of the department involved, or his designated subordinate, to make determinations "of entitlement of any person" to pay and allowances under the act and provides that "all such determinations shall be conclusive." The court concluded that this is compelling language under the decision in *Dismuke* v. *United States,* 297 US 167, (1936) and justifies the belief that the government has withheld its consent to be sued despite the fact that it has created a claim against itself. The case is weakened by the court's additional comment that the administrative determination was not arbitrary or capricious and would therefore be sustained even if it were assumed that the U. S. never intends to subject a claimant to a conclusive administrative decision that might be so characterized. *Moreno* v. *United States,* 93 F. Supp. 607 (Court Claims 1950).

With regard to this last point, the Court of Appeals for the First Circuit in *Marshall* v. *Crotty,* 185 F. 2d 622 (1950) quotes the Supreme Court's opinion in *Lynch* v. *United States,* 292 US 571 (1934), "when the United States creates rights in indi-

viduals against itself, it is under no obligation to provide a remedy through the courts. It may limit the individual to administrative remedies." In the *Marshall* case the court had before it an appeal from an action for a declaratory judgment that plaintiff had been wrongfully discharged from his position with the Veteran's Administration because he was a veteran and non-veterans were retained when a reduction in force was made. The discharge was in accordance with Civil-Service regulations which afforded at least one administrative appeal, but plaintiff asserted that the regulations violated the Veterans' Preference Act of 1944. The District Court (88 F. Supp. 30) dismissed the complaint for lack of jurisdictional amount but the Court of Appeals affirmed on the ground that Federal District Courts have no general original jurisdiction in cases of mandamus (which plaintiff had also sought by a supplementary complaint) and that a declaratory judgment that plaintiff be restored to his position would be futile and ineffective. Such a judgment would not be res judicata against the United States in the event plaintiff later sued for back pay, for if it did have such an effect it would constitute a suit against the United States, and the Court held that the Government has not consented to be sued in a Federal District Court in this type of case. The Veterans' Preference Act of 1944 fails to provide for judicial enforcement of the rights it confers and the statute vesting original jurisdiction in district courts is inapplicable.

The court referred in a footnote (note 3, page 628) to *Hilton* v. *Sullivan,* 334 US 323 (1948) where it was "assumed, without discussion, that the district court had jurisdiction to issue a declaratory judgment declaring a veteran's retention rights in government service" under the statute. The case arose in the District Court for the District of Columbia which does have original jurisdiction in cases of mandamus.

A remark of doubtful importance but of some interest on the subject of finality occurs in the per curiam opinion of the Second Circuit Court of Appeals in *Protective Committee* v. *SEC,* 184 F. 2d 646 (1950). There the committee attacked an order of the Commission for the dissolution of a holding company because, among other things, one of its subsidiaries, Eastern New York Power Corp., was expanding rapidly and would need financing which could be furnished by the sale of assets of the holding company. In answer to this argument the court said, "Finally, the probable future needs of the Eastern New York Power Corporation, and its ability to finance them by direct issues were incontestably matters as to which the Commission's judgment was conclusive." (Page 649)

An order of the Federal Communications Commission denying an applicant's petition for final grant of a construction permit and setting the application for hearing with other competing applications is not reviewable when the applications are mutually exclusive. *Johnston Broadcasting Co.* v. *FCC* (App. D. C. 1950 Pike and Fischer *Administrative Law,* 52 a 221-27). The court thought that the Commission's action, not being a refusal of the permit but only of the petition for the grant of the permit without the hearing, was not a final order.

If the issue of fact to be determined by an agency is such that in a trial by jury the petitioner would obviously not have been entitled to a directed verdict, the agency's decision of the issue, whether right

or wrong, is binding upon the court upon review just as the jury's verdict would have been, according to Judge Sanborn in *Robinson* v. *Railroad Retirement Board,* 184 F. 2d 703 (8 Cir. 1950). However, an error of fact, admittedly made in good faith, resulted in the reversal of a decision of the Federal Communications Commission in *Radio Station WOW, Inc.* v. *FCC,* 184 F. 2d 257 (App. D. C. 1950). There the Commission refused to designate for hearing the application of a Pueblo, Colorado, radio station for renewal of its license despite the petition of an Omaha, Nebraska, station which showed that objectionable interference occurred in its broadcasts as a result of the former's operations. The latter was the existing station when the license was originally granted to the former, and at that time the experts testified that there would be no interference. The court held that the Omaha station was entitled to be heard under the statutory provisions for renewal of licenses, but emphasized that the decision is limited to the facts and that not all of the questions considered upon the original application were reopened. Of course, the cases are not in conflict because the F. C. C. order which was reviewed simply denied a petition for a hearing and did not make a determination of fact.

In the *WOW* case, appellant had also petitioned the Commission to issue a rule to show cause why the Colorado station's license should not be modified. The denial of this petition was held not to be reviewable because the court interpreted the statutory reference to the applicant for modification of a license (who does have a right to be heard) to mean the owner of the license. Otherwise, the court felt, the situation would be "perpetually chaotic."

Scope of Review

An early round in the well-publicized dispute over color television went to the Federal Communications Commission when the District Court dismissed a complaint seeking a permanent injunction against the Commission's order. *Radio Corporation of America* v. *United States,* (N. D. Ill. Dec. 20, 1950-CCH Utilities Law Reports par. 9196). The court held that it was restricted to questions before it on the record made before the agency and that it could not grant a trial *de novo* as it would have to do if it were to consider complainant's argument, which was mainly predicated upon matters outside the record. Complainant attacked the Commission's findings but failed to allege that they were not supported by substantial evidence. The case has been argued in the Supreme Court. Although Judge Major referred to the District Court stage as "little more than a practice session," he prepared a full and interesting opinion including a detailed explanation of the reasons prompting the court to continue the stay in force pending a Supreme Court ruling despite the fact it had granted defendant's motion for summary judgment. The case affords a fascinating example of the problems arising from the interrelationship of law and rapidly advancing science. Judge LaBuy in his dissent would seem to preclude any order while the technology is so fluid and he would at least have required the Commission to hear additional evidence, apparently because in his view a better solution of the technical problem soon will be coming out of the laboratories. The majority of the court did not allow itself that type of consideration of the evidence, relying instead upon the substantial evidence rule.

The scope of judicial review of NLRB

orders, since decided by the Supreme Court was raised in *Superior Engraving Co.* v. *NLRB*, 183 F. 2d 783, where the Seventh Circuit Court of Appeals again held that a court of review must regard the Board's findings of fact as conclusive if supported by substantial evidence on the record considered as a whole. In resolving the question whether such support exists, the court reiterated its conviction that it is not empowered to try the case *de novo*, to judge of the credibility of witnesses or to weigh the evidence which was before the Board, but is limited to the determination "whether there is, on the entire record, substantial and adequate evidence to support the Board's findings." Whether the word "adequate" adds anything to the test, the court failed to explain.

Courts cannot review the exercise of discretion granted to an agency. There must be a clear abuse of discretion or a clear failure to exercise discretion before the courts may interfere, and in the latter instance they can require only that the discretion be exercised. So says Judge Frank in *United States ex rel Adel* v. *Shaughnessy*, 183 F. 2d 371 (2 Cir. 1950). In that case relator was seeking habeas corpus to review a deportation order based on an administrative finding made in 1946 that she had engaged in prostitution up to April 1943. The statute was amended in 1948, before she had been deported, so that she became eligible for discretionary relief if she proved "good moral character for the preceding five years." The Board of Immigration Appeals refused to reopen and reconsider her case, and the court sustained the Board, saying that it was entitled to rely on the 1946 findings and need not grant a new hearing. In this decision the Board was exercising a discretion that could not be reviewed.

There have been no other particularly noteworthy cases on the scope of review recently. That the credibility of witnesses and the inferences reasonably to be drawn from the evidence are matters to be determined by the agency and not the court was reiterated by the Tenth Circuit Court of Appeals in *N. L. R. B.* v. *Beatrice Foods Co.*, 183 F. 2d 726 (10 Cir. 1950). The challenged finding of the Board was that threats of reprisal and promise of benefit could reasonably be inferred from the manager's statement to the employees. In *N. L. R. B.* v. *Grace Co.*, 184 F. 2d 126 (8 Cir. 1950) the court held that the Board's selection of the unit for collective bargaining purposes must be clearly arbitrary and unreasonable before it will be disturbed by the court, and a showing that a different union would have made an equally appropriate unit does not constitute proof of the arbitrary and unreasonable nature of the Board's determination.

Stay

Public policy was considered as a factor in the discussion of the grant or denial of a stay of a CAB order under § 10 (d) of the Administrative Procedure Act by the court in *Trans World Airlines, Inc.* v. *CAB*, 184 F. 2d 66 (2 Cir. 1950). The court was not convinced that a stay was necessary in order to avoid irreparable injury to the petitioner and felt it would cause loss to other parties, and finally, clinched its argument on the ground that public policy, as indicated by a Presidential statement, militated against delay. Ultimately this case was decided on jurisdictional grounds so that the entire discussion is dicta.

Court Enforcement of Administrative Orders

The employer and union were in agreement and the latter had asked the Board to dismiss the complaint against the former by the time the Board sought an injunction against the employer's unfair labor practices, but the court in *NLRB* v. *National Biscuit Co.*, 185 F. 2d 123 (3 Cir. 1950) felt that it was nevertheless required to issue the injunction under *N. L. R. B.* v. *Mexia Textile Mills*, 339 US 563 (1950) inas much as there was substantial evidence supporting the Board's findings. However, the court refused to issue a mandatory injunction requiring the employer to repeat what it had already done (such as posting notices and offering to reinstate an employee) on the ground that the court's powers to enforce Board orders under the Act are equitable in nature and their use must be consistent with the principles of equity.

Likewise in *NLRB* v. *United Brotherhood*, 184 F. 2d 60 (10 Cir. 1950) the court held that the Board's cease and desist orders do not become moot because they have been obeyed or are no longer called for as a result of changing circumstances. Consequently, the Board is entitled to an enforcement order from the court although the unfair labor practices were abandoned after entry of the Board's order.

A court may protect its potential jurisdiction over an administrative order even in the absence of an appealable or reviewable order. *Board of Governors of Federal Reserve System* v. *Transamerica Corp.*, 184 F. 2d 311 (9 Cir. 1950). The Board was in the course of hearings under a complaint charging the respondent with violating the Clayton Act, particularly by ownership of certain bank stock, when the respondent arranged to acquire the assets of the banks. This would have defeated the Board's jurisdiction, to defend which it secured an injunction against such acquisition of assets. The theory of the court was that it could prevent acts which would frustrate its authority to review or enforce the final order. Thereafter respondent sought a stay of the Board's order pending review, but it was denied because respondent had just been held in contempt for disobeying the injunction. The court required restoration of the status quo ante as a condition precedent to grant of a stay. 184 F. 2d 319. Finally respondents purged themselves of the contempt. 184 F. 2d 326.

Effect of Administrative Interpretation

Must Congress know that it is adopting an administrative interpretation of a statute before mere reenactment can be given conclusive effect as such? Judge Prettyman answered affirmatively in *Pacific Power & Light Co.* v. *FPC*, 184 F. 2d 272 (App. D. C. 1950), saying (page 275): "At best the reenactment of statutes is a nebulous foundation for statutory construction." The Commission had decided that it lacked authority to grant the company a construction license to cross public lands under the facts presented, although it had earlier exercised such authority for twenty-one years under its then interpretation of the statute. Agreeing that the previous construction, based upon the premise of the broad purpose of the Act, was erroneous, the court stated "we think that the administrative practice upon that premise cannot be given effect as altering the statute itself." Dismissal of the application was affirmed.

The difference in the language used to describe the weight to be given to an ad-

ministrative interpretation of a statute in some recent cases is rather startling. In *Tobin* v. *Flour Mills of America, Inc.,* 185 F. 2d 596 (8 Cir. 1950) the court said that it had not "overlooked" the rule that "interpretations of the Administrator are entitled to respect at the hands of the courts" but it overruled the construction of the Fair Labor Standards Act adopted by the Administrator of the Wage and Hours Division. This case involved the "area of production" problem which caused the Administrator so much difficulty in *Addison* v. *Holly Hill Fruit Products, Inc.,* 322 US 607 (1944).

On the other hand, in three cases the court said the administrative interpretation was to be given "great weight." This is especially true according to Judge Bazelon in *West Texas Utilities Co.* v. *N. L. R. B.,* 184 F. 2d 233, 235 (App. D. C. 1950) "where the legislative intent is ambiguous." "Such deference keeps the inexpertness of courts, which must deal with the whole gamut of the law, from distorting the policy of congress in complex areas of the economy requiring specialized skills and scrutiny. It minimizes the danger that lay constructions will be given to the words which are terms of art to those schooled in their special fields." In *Commissioner* v. *Nubar,* 185 F. 2d 584 (4 Cir. 1950) a Treasury Department regulation construing a section of the Revenue Code was given "great weight", and here emphasis was on the fact the interpretation was of long standing. Finally, the Interstate Commerce Commission's interpretation of the phrase "private carrier" as used in the Interstate Commerce Act was given "great weight" in *Brooks Transportation Co.* v. *United States,* 93 F. Supp. 517 (E. D. Va. 1950) on the authority of *Levinson* v. *Spector Motor Co.,* 330 US 649 (1947) in which Mr. Justice Burton cited the Commission's practical experience with the subject and its responsibility for administering and enforcing the Act. The difference in language, if of any significance, is not explained by the reasons added by the last three courts, for the first court had at hand many of the same grounds and also the rule, which it acknowledged, that exemptions from the Fair Labor Standards Act must be narrowly construed. See also *I. C. C.* v. *Service Trucking Co. Inc.,* 186 F. 2d 400 (3 Cir. 1951) (where expertness is not primarily involved but question involves jurisdiction force of administrative ruling is lessened); *Brannan* v. *Stark,* 185 F. 2d 871 (App. D. C. 1950) (test is whether Secretary's Construction is warranted by the record and reasonably interprets the law); and *United States* v. *Bennett,* 186 F. 2d 407 (5 Cir. 1951) (ruling of Bureau of Internal Revenue's income tax unit has no more binding effect than opinion of any other lawyer).

Res Judicata

The doctrine of *res judicata* is not applicable to an administrative determination when the same issue arises between the same parties in a subsequent civil suit. Plaintiff in *Segel* v. *Travelers Ins. Co.,* 94 F. Supp. 123 (D. C. 1950) suffered a heart attack shortly after being in an automobile accident which had occurred in the course of his employment. His application for compensation under the Longshoremen's and Harbor Workers' Compensation Act was denied when the Deputy Commissioner held that the heart attack was due to pre-existing disease and not the result of the accident. Plaintiff then brought suit against

Travelers Insurance Company, which was his employer's insurance carrier under the compensation act, for disability benefits which he claimed under a policy he himself carried with that company. The company's defense of *res judicata* was unacceptable to the court which remarked that "there seems to be a strange paucity of authority on this point." The court reasoned first, that the administrative process and the judicial process are governed by different principles, fulfill different functions and operate in separate spheres, and second, that the determination of an administrative agency not being *res judicata* in another administrative proceeding would, *a fortiori*, not be *res judicata* in a subsequent judicial proceeding. The court refers to the dictum in *Hoage* v. *Terminal Refrigerating & Warehousing Co.*, 78 F. 2d 1009 (App. D. C. 1935) as precedent and dismissed the language in *Dennison* v. *Payne*, 293 F. 333 (2 Cir. 1923) as merely the dictum of a foreign Court of Appeals. Other cases cited by defendant were distinguished. The court pointed out, for example, that the decision of the agency in *Trupasso* v. *McKie Lighter Co.*, 79 F. Supp. 641 (D. Mass. 1948) had been affirmed by a court in a judicial proceeding, and that it was the judgment of the court that was deemed *res judicata*. There are state decisions that seem to be *contra*, but Judge Holtzoff regarded them as being out of line with the reasoning of the federal cases.

A finding by the National Railroad Adjustment Board that a railroad employee had been such for a certain period was not a determination of status binding upon the Railroad Retirement Board in deciding whether he was entitled to an annuity. *Lane* v. *Railroad Retirement Board*, 185 F. 2d 819 (6 Cir. 1950). Otherwise, the court felt the Congressional intention to confide all power necessary to the administration of the Retirement Act in the latter Board would be defeated.

An administrative determination of alienage is not *res judicata* because § 503 of the Nationality Act of 1940 provides for a trial *de novo* of the issue by the court. *Mah Ying Og* v. *McGrath*, (App. D. C. 1950), Pike and Fischer, *Administrative Law*, 48 F. 723-7). It should be emphasized that this is not the rule in court proceedings for a writ of *habeas corpus*, for in that case the administrative finding of alienage is final if the hearing was fair. *United States ex rel. Chu Leung* v. *Shaughnessy*, 176 F. 2d 249 (2 Cir. 1949). In the *Mah Ying Og case*, the ruling of the Board of Immigration Appeals had been sustained on relator's application for *habeas corpus*, and on this ground the government's motion for summary judgment was granted in the proceedings under § 503. However, the government abandoned this ground on the appeal because the agency had reopened the case and received evidence after the court had denied *habeas corpus*.

Rules and Regulations

A Treasury Regulation defined the phrase "certificate of indebtedness" as used in § 719 (a) (1) of the Internal Revenue Code so as to exclude such an instrument when used to evidence a bank deposit. The regulation was unsuccessfully attacked in *Commissioner* v. *Ames Trust and Savings Bank*, 185 F. 2d 47 (8 Cir. 1950) the court holding that the paragraph of the statute being of general scope, concept and language, the regulation could undertake to place the paragraph in a setting of business reality, and

consequently, it was not *ultra vires*. Another Treasury Regulation was sustained in *Birmingham* v. *Geer*, 185 F. 2d 82 (8 Cir. 1950-Certiorari denied March 26, 1951) because the statute, being ambiguous, was a proper subject for an interpretative regulation.

Still another Treasury Regulation did not fare so well in *Epley* v. *Commissioner*, 183 F. 2d 1020 (5 Cir. 1950). Here the Commissioner sought by the regulation to differentiate between soldiers from community property and other states, but the court held the regulation *ultra vires*, on the ground that the statute was remedial and the regulation niggardly. The Act provided that the paragraph "shall be applied in accordance with regulations" adopted by the Commissioner, but the court stated that this language did not give him power to change the clear purpose of the law. To the same effect with regard to a Treasury Interpretation, see *Irrgang* v. *Fahs*, 94 F. Supp. 206 (S. D. Fla. 1950).

The N. L. R. B. may waive or apply its procedural rules "as the facts of a given case may demand in the interest of stability and fairness in collective bargaining agreements" according to *NLRB v. Grace Co.*, 184 F. 2d 126, 129 (8 Cir. 1950). The difficulty is in the differentiation of a procedural rule from a substantive rule. In this case the rule held to be procedural was that the existence of a written and signed bargaining agreement is a bar to a certification proceeding for a different representation.

Defendant in *United States* v. *Obermeier*, 186 F. 2d 243 (2 Cir. 1950-Certiorari denied March 26, 1951) was convicted of perjury, having been found guilty of knowingly making a false statement in a prepetition examination required by an administrative regulation which prescribed that the examination should be under oath. Defendant contended that he had committed no crime because the statute did not require the administration of an oath and Congress had failed to supply such a statute when requested to do so. However, the Court held that the statutory provision empowering the Commissioner of Naturalization to "make such rules and regulations as may be necessary to carry into effect the provisions" of the Act was sufficient authority for the regulation, especially since Congress had never changed its terms in the many years the requirement had been in effect.

A regulation of the Social Security Administration provided that whenever an applicant failed to supply additional information within a year of the date it was requested, the application was to be regarded as abandoned. In *Ewing* v. *Gardner*, 185 F. 2d 781 (6 Cir. 1950) the lower court had held the regulation void because the Act did not provide for forfeiture, but the Court of Appeals held that it was valid if construed merely as dismissing the proceeding without prejudice, for that was a reasonable method of keeping the files clear of pending but unprosecuted applications.

Miscellaneous Cases

The nature of the "charge" which the National Labor Relations Act requires to be filed before the Board can issue a complaint is discussed in *Kansas Milling Co.* v. *N. L. R. B.*, 185 F. 2d 413 (10 Cir. 1950). The court explained the charge as essential to setting an inquiry in motion to determine whether a complaint should issue, but stated that it was not a pleading and that

the strictness of formal pleading was not required. "A charge in the general language of the statute is sufficient." (Page 415)

What is a final order of an agency? The question arose again in *Northwest Airlines, Inc.* v. *Jackson,* 185 F. 2d 74 (8 Cir. 1950) under the section of the Portal-to-Portal Act of 1947 which makes good faith reliance on an administrative order or ruling of the United States a defense to a suit for overtime pay. In this case the court held that a decision of the chairman of the National Railway Panel was such an order or ruling although he did not have final authority. The opinion points out that there are no provisions for review of his decision when it is complied with and that one seeking a more final determination would first have to secure an adverse ruling from the chairman and follow it up through many levels of authority.

When the Interstate Commerce Commission under the statute and its own rules had authority to reopen a proceeding in which it had authorized a carrier to purchase certain rights, the carrier could not complain about the Commission's doing so even though the purchase had been consummated in reliance upon the original order and the ultimate order denied permission for the transaction. *Rapid Transit Co.* v. *United States,* 91 F. Supp. 509 (D. Mass. 1950).

STATE CASES AND LEGISLATION

Limitations on space in this issue of the Bulletin preclude more than a cursory reference to some of the more interesting state decisions handed down during the period covered. However, some at least of these cases should be noted. In *State* v. *Mountain States Tel. & Tel. Co.,* 224 P. 2d 155, (1950), the Supreme Court of New Mexico held that it lacked jurisdiction to review the reasonableness of rates of a telephone company on behalf of the public, which had no property right involved. Admittedly it could review the agency's decision upon the appeal of the company if the latter raised the issue of confiscation, but this did not, in the view of the court, give rise to a reciprocal right in the public to appeal. The remedy is in the legislature and not the court. Under the law the Commission is the only forum to which the public may resort, and it has ruled that the rates are reasonable. Consequently the public has no just cause of complaint. On the other hand, the Supreme Court of Alabama held in *Birmingham Electric Co.* v. *Alabama Public Service Commission,* 47 S. 2d 449 (1950), that the Commission, having ruled adversely on an application of a utility for an increase in rates, cannot defend its order in court against an appeal taken by the utility, because it is "an impartial tribunal with statutory powers, legislative in character, to regulate rates of public utilities." In *City of Portsmouth* v. *Public Utilities Commission,* 154 Ohio St. 174, 93 N. E. 2d 563 (1950) it was held that appellants could not take advantage of objections made at the Commission's hearings by parties who did not file an application for rehearing because appellants had failed to join in the objections, and the objectors had failed to join in the appeal. In an Illinois case, *Granite City* v. *Illinois Commerce Commission,* 407 Ill. 245, 95 N. E. 2d 371 (Sup. Ct. Ill. 1950) it was urged by appellee that before the Commission could change its previous order it would have to find that

conditions had changed or that the first order had been mistaken in law or fact, but the Commission defended on the ground that the objection had not been raised in appellee's petition to the Commission for rehearing. The court sustained the defense, stating that appeals are statutory and the statute requires that all grounds of appeal must be set forth in the petition for rehearing. A general allegation that the order is unreasonable and unlawful does not cover any such specific ground of complaint as that which appellee sought to raise.

An ordinance made the "reproduction of recordings of a lewd or indecent nature" grounds for the revocation of a license to operate a juke box in a place of business, and it was held that this furnished a sufficiently definite test for the guidance of the licensing agency in the revocation of licenses as against an attack that the ordinance was unconstitutional because it failed to provide a standard. *Marine Corps League* v. *Benoit,* 78 A. 2d 513 (Sup. Ct. N. H. 1951). More vulnerable was a New Jersey statute attacked on the same ground in *Abelson's Inc.,* v. *New Jersey State Board of Optometrists,* 5 N. J. 412, 75 A. 2d 867 (1950). There it was provided that a license to practice optometry might be refused, revoked or suspended for "any conduct which, in the opinion of the board, is of a character likely to deceive or defraud the public." This established a subjective test, according to the court, that was so vague as to constitute a violation of due process (because those subject to the statute could not know what conduct would render them liable to its penalties) and an unconstitutional delegation of power. Had the standard been simply "conduct which is of a character likely to deceive and defraud the public" it would have been sustained, but the court thought that the actual language gave the administrative agency power to legislate and not merely to implement law. On the delegation issue the Supreme Court of California has also had something to say lately. The Financial Responsibility Act of the state was attacked on a number of constitutional grounds in *Escobedo* v. *State Department of Motor Vehicles,* 222 P. 2d 1 (1950), and the court said, among other things, "Although the Legislature did not provide detailed directions as to the manner in which the department was to reach a 'judgment' as to the amount of security required, it specified as a guide the probable size of 'any [court] judgment' which 'may be recovered.'" The standard was sufficient inasmuch as "the facts and legal principles governing the recovery of judgments for damages are a matter of public knowledge."

The *Escobedo* case is of greater importance perhaps because of its holding on the matter of the right to a hearing prior to the suspension of a driving license. The statute provided for an administrative hearing upon written demand whenever the department had given notice of suspension, but it also provided that the licensee was not entitled to a hearing under this section when the statute made the suspension mandatory. Failure to deposit security made the suspension mandatory whenever an accident had occurred and damage exceeding $100 had ensued which might lead to a judgment for damages. However, the statute expressly declared that nothing in the act should be deemed to prevent review or other action by the courts in cases of refusal, cancellation, suspension or revoca-

tion of a license. Therefore the court held that the "suspension of the license without prior hearing but subject to subsequent judicial review did not violate due process if reasonably justified by a compelling public interest." The statistics on motor vehicle registrations and accidents readily supplied the compelling public interest. Two justices dissented in separate opinions.

A provision of the New Jersey Constitution requires that "formal rules and regulations which are intended to have binding force on the general class of persons affected thereby" must be filed with the Secretary of State. The State's Small Loan Law specifies that the Commissioner shall issue a license to engage in the loan business if he finds among other things that the granting of the license will promote the convenience and advantage of the community. On the basis of this language in the statute the Commissioner instituted a "general policy of limitation, under which new licenses were not granted unless the Commissioner found that they would promote the convenience and advantage of the community, particularly in the light of its population and estimated 'loan capacity' ". It was held in *Family Finance Corporation* v. *Gough,* 10 N. J. Super. 13, 76 A. 2d 82 (1950) that the Commissioner's general policy of limitation was a departmental course of conduct to which the constitutional provision did not apply . . . it "was not fixed, did not constitute a hard and fast rule and was not intended to have binding effect."

House Bill No. 169 introduced in the Legislature of the State of Washington, January 24, 1951, if passed will provide that State with an act governing administrative procedure and judicial review of administrative determinations.

SECTION ACTIVITIES

Procedures of Emergency Agencies Being Studied.

A special committee of the Section of Administrative Law, American Bar Association, has been appointed by Reuben Hall, Chairman of the Section, to look into the procedures of the emergency agencies in the Federal Government.

The Committee will be concerned primarily with the procedures to be followed by the agencies created under the Defense Production Act of 1950 (approved September 8, 1950, 64 Stat. 798, 50 U. S. C. A. Appendix 2061-2166), such as the Office of Price Stabilization, Defense Production Authority, Wage Stabilization Board, and others which have been or may be created. The emergency agencies are exempt from the requirements of the Administrative Procedure Act but it is hoped that procedures can be followed which will assure fair play without unduly hampering or restricting the expeditious disposition of the problems arising from the defense effort. The content of the substantive regulations is outside the scope of the committee's activities.

The committee will be glad to hear from lawyers who have experienced procedural problems with the emergency agencies, or who have suggestions for procedural improvement. Information and suggestions should be sent to Mr. Wendell Berge, Chairman of the Committee, Ring Building, Washington 5, D. C. The committee is not in a position to make and will not make individual acknowledgments nor will it assist in the disposition of individual problems. The committee will consider and give attention to any comments or suggestions

submitted in connection with its study and resulting recommendations on procedural policies and practices of the emergency agencies.

In addition to Mr. Berge, Chairman, other members of the committee are: Harry J. Breithaupt, Jr., Dean Dinwoodey, Robert K. McConnaughey, John P. Moore, David Reich, Charles Effinger Smoot, and Ralph P. Wanlass. All correspondence, however, should be addressed to Mr. Berge, the Chairman.

Bulletin Editor

Bernard Schwartz, the regular editor of the Bulletin, is on leave of absence from New York University School of Law until September, 1951. During his absence William F. Schulz, Jr., University of Pittsburgh School of Law, is acting as editor.